

SARAH F. LINDGREN  
(ON RECONSIDERATION)

IBLA 76-146

Decided April 22, 1981

Petition for reconsideration of a Board decision affirming the rejection of Native allotment application AA-8228.

Petition for reconsideration granted; Sarah F. Lindgren, 23 IBLA 174 (1975), and decision appealed from vacated; case remanded for contest proceedings.

1. Alaska: Native Allotments

A Native allotment application for withdrawn lands may be granted when the applicant has commenced the required use and occupancy prior to the withdrawal, if all other requirements have been met. The substantial use and occupancy required by the Native Allotment Act must be achieved by the Native as an independent citizen acting for herself, and not as a dependent child visiting and using the land in the company of her parents. Native allotment applicants who were 8 years old and older at the date the land was withdrawn and who assert independent use and occupancy of the land should be afforded notice and opportunity for a hearing to prove the adequacy and independence of their use and occupancy.

APPEARANCES: James E. Hutchins, Esq., Anchorage, Alaska, for appellant.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

Sarah F. Lindgren has petitioned the Board for reconsideration of our decision, Sarah F. Lindgren, 23 IBLA 174 (1975), in which we

affirmed the rejection of her Native allotment application, AA-8228. <sup>1/</sup> Her application was rejected because the land she applied for had been withdrawn on December 17, 1941, by Exec. Order No. 8979 establishing the Kenai National Moose Range. Although she claimed she used the land in the company of her father since 1935 when she was 10 years old, we determined that her application did not establish that she commenced her own independent use and occupancy before the withdrawal period. We held that the Native must have initiated qualifying use and occupancy for 5 years prior to the withdrawal, and that such qualifying use and occupancy must be achieved by the Native as an independent citizen and not as a minor dependent child occupying or using the land in the company of her parents. Appellant was 10 years old when she commenced occupancy in 1935 and 16 at the time of the withdrawal. We had denied appellant's request for hearing because we perceived no issue of fact on which a decision in appellant's favor could be predicated.

In her petition for reconsideration appellant contends that it is a breach of the Department's fiduciary duty if we fail to construe the Native Allotment Act liberally in favor of Native applicants. She further argues that we failed to take into consideration Native customs and mode of living which require that a child learn subsistence functions at a very early age. She argues that it is improper to deny her application solely on the basis of age, and that the degree of independence of her use raises an issue of fact that requires resolution at a hearing, citing Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976).

[1] We adhere to our determination that the substantial use and occupancy required by the Native Allotment Act must be achieved by the Native as an independent citizen acting for herself and not as a dependent child visiting and using the land in the company of her parents. Andrew Petla, 43 IBLA 186 (1979). Since the Board's decision in the instant appeal, the Secretary of the Interior by Secretarial Order No. 3040 of May 25, 1979, ruled that a Native applicant may be granted an allotment on withdrawn lands if all other requirements have been met, when the applicant has commenced the required use and occupancy prior to the withdrawal. See Bella Noya, 42 IBLA 59 (1979). In addition, the Board has recently ruled that Native allotment applicants who were 8 years old or older at the date that the land was segregated from entry and who assert independent use and occupancy of the land should be afforded notice and an opportunity for a hearing to prove

---

<sup>1/</sup> In our decision in Sarah F. Lindgren, *supra*, we also affirmed the rejection of the allotment application of Emery V. Showalter, who joined Lindgren in her petition for reconsideration. Subsequently, however, Showalter's application was relinquished, and the petition for reconsideration of that appeal was dismissed by order dated October 2, 1979 (Docket No. IBLA 76-148).

the adequacy and independence of their use and occupancy. William Bouwens, 46 IBLA 366 (1980). As the case file itself does not provide adequate information to determine the independence of the Native's use, the State office should provide the Native an opportunity for a hearing by initiating contest proceedings against the application. See Donald Peters, 26 IBLA 235, 83 I.D. 308, sustained on reconsideration, 28 IBLA 153, 83 I.D. 564 (1976).

Moreover, we would point out that appellant's application indicates that the land was used from 1934 to 1939. Appellant was then absent from the land until 1946. The land was withdrawn in 1941. Evidence should therefore be taken to ascertain whether this cessation of use and occupancy terminated any inchoate right to an allotment of this parcel. See United States v. Flynn, 53 IBLA 208, 88 I.D. (1981).

We note that appellant's application and the decision rejecting it describe the lands applied for as being within sec. 6, T. 7 N., R. 7 W., Seward meridian. The accompanying maps, however, show that the lands applied for are in sec. 6, T. 4 N., R. 7 W., Seward meridian, and in sec. 1, T. 4 N., R. 8 W., Seward meridian. On January 5, 1978, appellant relinquished her application with respect to the lands described in sec. 1, T. 4 N., R. 8 W., Seward meridian.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, appellant's petition for reconsideration is granted; our prior decision and the decision appealed from are vacated, and the case remanded for initiation of contest proceedings.

---

Anne Poindexter Lewis  
Administrative Judge

We concur:

---

James L. Burski  
Administrative Judge

---

Edward W. Stuebing  
Administrative Judge

